

## David Jenkins An ethos for (in)justice

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## Ethos for (In)Justice

“I believe in the brotherhood of all men, but I don't believe in wasting brotherhood on anyone who doesn't want to practice it with me. Brotherhood is a two-way street”.

Malcolm X

What justice demands of individuals in ideal circumstances is different to the form those demands will take in non-ideal circumstances. Where we have an institutional background organised according to principles described as just, citizens' appropriate motivations and behaviours will set about *supporting* and *stabilising* this situation in order to ensure its continuity. However, when the institutional background does not conform to such principles, such stabilising behaviour will not produce the same (just) consequences. Indeed, if everyone's behaviour merely stabilised a situation characterised by substantial injustice then that injustice would continue indefinitely. As a consequence, in non-ideal circumstances in order to behave justly individuals will have to respond to a different set of motives and adopt a different kind of ethos than that which would be suitable to a situation absent injustice.

There exist possible tensions and oppositions between the demands made of individuals in non-ideal circumstances and demands as they would appear in ideal circumstances. Individuals who come together to resist what they perceive as injustice may be permitted to withdraw from and disrupt productive practices; to break laws they consider unjust and confine their obligations, reciprocal actions and justifications for their actions, to a smaller set of people defined and united by common opposition to injustice and its perpetrators. While this kind of disruption and adversarial behaviour will be

inappropriate in a situation that is fully just, it becomes both appropriate and necessary so long as (at least) substantial injustice remains.

I begin the essay by developing an account of the kinds of actions, decisions and behaviours that comply with principles of justice within ideal conditions. In so doing, I draw on G.A. Cohen's notion of an 'ethos' to expand on and clarify John Rawls' appeal to individuals' 'sense of justice' and the associated notion that citizens should 'act from' principles of justice. Although there are important and fundamental differences between the thought of these two thinkers, there nevertheless remains the possibility for a dialogue between them that can help clarify the contributions and limitations of the other.

As an aspect of this dialogue I use Cohen's idea of a 'justificatory community' to specify what constitutes both ideal and *non*-ideal conditions. We describe people as just when their actions are constrained by demands made of them by a community to which they owe justification for those actions. When individuals act contrary to such demands then they act unjustly and, moreover, contribute toward a situation *of* injustice. However, precisely *because* of the presence of these individuals – and groups of individuals – who are *not* suitably motivated to follow the constraints imposed on them by membership to a justificatory community, the ethos appropriate to ideal conditions is no longer applicable: It must change to accommodate the presence of – and react to – that second class of individuals.

I end the essay by tracing the different aspects of an ethos suited to non-ideal conditions. Rawls alludes to the costs of 'assistance' in bringing about just institutions without providing adequate detail as to the content or extent of those costs. In developing this alternative ethos I draw on a particular account of political solidarity to provide some

sense of these costs. These costs are incurred in the creation of oppositional political associations, the members of which are, in light of continuing injustices produced by those individuals and groups acting 'out of community' with relevant others, permitted the disruption of institutions, infrastructure and various other practices that contribute to the production and sustaining of injustice.

### *Compliance and Assistance*

There has been a great deal of discussion about the appropriate 'site' of justice. When we talk about justice with which part of the world should we concern ourselves: Is justice limited to a description of the principles which organise background institutional structures, from our parliaments to our tax codes, from our labour markets to our education system? Or is justice *also* a description of the kinds of behaviours, attitudes and characteristics of the citizens who occupy a just society?

At some level the above distinction is an obviously exaggerated one. A government could establish a fully just set of institutions which a majority – or even a minority – of its citizens reject so thoroughly that they exit that society and in so doing undercut the practicability of those institutions. There will always need to be some minimum level of citizen identification with the institutional background in order for the principles that inform and shape that background to function at all, even if that minimum level simply describes mere passive acquiescence – in light of the costs of exit – rather than an active and whole-hearted embrace. No set of institutions, however just, will last long if the citizens they are supposed to organize vote them out of existence or simply leave them behind to live

elsewhere.<sup>1</sup> What Rawls calls the ‘basic structure’ may be that which secures ‘background justice’ but it does not do so distinct from the behaviours and attitudes of the citizens whose lives are framed by that background. The level of the individual interactions, i.e. the relationships, behaviours and actions of citizens, as conditioned by a just basic structure is thus a necessary part of justice.

The separate question as to whether the institutional background is *primary* to the decisions, actions and attitudes of the citizens of the just society is one I can afford to bracket: Put idiomatically, whether the chicken came first or the egg came first, we need chickens if we want eggs and eggs if we want chickens. I can thus agree with Samuel Scheffler when he argues that individual behaviours remain a concern for those who wish to argue for the primacy of the institutional background when discussing matters that pertain to justice.<sup>2</sup> Moreover, while Rawls himself is certainly amongst those who argue for the primacy of the basic structure, he nevertheless provides some resources to describe what kinds of attitudes and behaviours are suitable for citizens living under just institutions.

In Rawls’ account the behaviours and attitudes expected of citizens are significantly more substantial than the possibly grudging acquiescence and passive acceptance alluded to above. Against a just basic structure, individuals derive part of their motivations from what Rawls calls a ‘normally effective sense of justice’. This takes as its reference point the

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<sup>1</sup> Tommie Shelby, ‘Justice, Deviance and the Dark Ghetto’, *Philosophy and Public Affairs*, 35:2 (2007) p 153 makes just this point. Regarding this divide see also; G.A. Cohen, *Rescuing Justice and Equality* (London: Harvard University Press, 2008) p 123; G.A. Cohen, *If you’re an egalitarian, how come you’re so rich?* (London: Harvard University Press, 2000) p 128; Liam Murphy, ‘Institutions and the demands of justice’, *Philosophy and Public Affairs*, 27:4 (1998) pp. 251 – 291. For a view sympathetic to the Rawlsian approach see Thomas Pogge, ‘On the site of Distributive Justice: Reflections on Cohen and Murphy’, *Philosophy and Public Affairs*, 29:2 (2000) pp. 137 – 169.

<sup>2</sup> Samuel Scheffler, ‘Is the Basic Structure Basic?’ in Christine Sypnowich, *The Egalitarian Conscience: Essays in Honour of G.A. Cohen* (Oxford: Oxford University Press, 2006) pp. 102 – 128. See also David Estlund, ‘Liberalism, Equality, and Fraternity in Cohen’s critique of Rawls’, *The Journal of Political Philosophy*, 6:1 (1998) pp. 99 – 112.

principles of justice derived from the Rawlsian original position. While vague as to the actual details of how these principles might affect individuals' decisions and behaviour, broadly speaking citizens of the just society will "act from the principles of justice in the ordinary course of events".<sup>3</sup> This is more than mere compliance: Citizens will have their daily lives not only *constrained* by what these principles imply but, since they are to be acted '*from*', such principles will also supply at least some of the motivation behind what they do and the choices they make.<sup>4</sup>

For Rawls, the actions of appropriately motivated agents run as follows. First, they comply with the principles of justice in order to do their share in the sustaining of just institutions. Second, they are to 'assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost' to themselves.<sup>5</sup> In essence then individuals are required to 'do their part' in both the *sustaining* and, when costs are not too high, *establishment* of just institutions. Under conditions of full compliance this is of course much easier – where we can be assured of everyone else complying with this couple of demands because all are similarly motivated to act justly, the cost to each individual is going to be relatively small.<sup>6</sup> However, the possible differences between activities that are, for instance, suitable for 'compliance' but not 'assistance' is something that is not entirely clear.

In what follows, I take 'compliance' and 'assistance' separately. Compliance is that which is appropriate to preserve an already just situation. Assistance on the other hand

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<sup>3</sup> John Rawls, *Justice as Fairness*, p 9; pp. 18 - 19.

<sup>4</sup> Michael Titelbaum makes an important point here. Since the focus of the difference principle is the institutional arrangements, when individuals act 'from' the difference principle in the course of their everyday lives it is in fact acting from a *correlate* of the difference principle, i.e. 'a principle that directs him to organize his decisions around the same goals that the difference principle specifies for the basic structure of society'. Michael Titelbaum, 'What would a Rawlsian ethos of Justice look like?', *Philosophy and Public Affairs*, 36:3 (2008) p 293.

<sup>5</sup> Rawls, *Theory of Justice*, 293-294.

<sup>6</sup> Liam Murphy, *Moral Demands in non-ideal Theory*, (Oxford: Oxford University Press, 2000) p 12.

allows for a certain distance between ideal and non-ideal circumstances: So long as the costs are not too great, individuals are, according to Rawls, obliged to help establish institutions that more fully correspond to the principles of justice. Fully just circumstances will have no need for this additional assistance since compliance will be enough: Our duties will flatten out to be of the preservative variety alone. However, as the distance between ideal and non-ideal increases, it becomes increasingly necessary to gain sense of the content and extent of this 'assistance', as well as its costs.

This question of appropriate assistance will occupy the latter part of this paper. For now, I will draw on Cohen's critique of Rawls to supplement and expand on the content of the demands of compliance. Cohen's explication of the 'egalitarian ethos' is similar in *intent*, if not in extent, to the Rawlsian notion of a 'normally effective sense of justice': it specifies the kinds of constraints that will operate on the decisions and actions taken by individuals who are suitably motivated by the demands of justice.

It is specifically with reference to what is involved in individuals 'acting from' the difference principle that exercises Cohen's criticisms of Rawls. Cohen suggests that in situations where institutions are governed according to just principles, and assuming individuals really are motivated by justice, behaviour truly compliant to and embracing of those principles would not only operate at the level of the rules governing institutions but would, in line with Rawls' own notion of an 'effective sense of justice', also impact at the level of individual behaviour. The issue is whether this 'effective sense' can be completed exclusively by Rawls' formal stipulation that compliance issues in the requirement to vote for parties – and urge others to do the same – whose proposals come closest to conformity

with the principles of justice.<sup>7</sup> Is this to be the extent of our 'sense of justice' in ideal conditions? Are other decisions and actions to be released from any concern with what that 'sense' might amount to?

Such a limited 'sense' would justify a certain amount of social schizophrenia. A person could move to a constituency where their vote for the right government – the one that he believed would introduce proposals closest to the Rawlsian principles of justice – would have no chance of affecting the overall outcome. He could urge neighbours to follow him, safe in the knowledge that such cajoling will have little consequence. If nothing outside of these kinds of 'official' activity are relevant to the notion of 'acting from' principles of justice, then we quickly descend into this species of counter-intuitive, 'just' behaviours.

Cohen provides a more detailed specification of the impact 'acting from' the Rawlsian *difference principle* might conceivably have on individuals' productive decisions. Where individuals are suitably motivated to comply with the principles of justice, Cohen argues that both the additional incentives and inequalities that are their consequence – those Rawls deems necessary and legitimate parts of getting the talented to work more productively for the benefit of the worst off – would in fact end up *producing* a certain amount of injustice, precisely because it is a situation that involves submitting to the demands of individuals failing to 'act from' those principles of justice. Individuals *properly* motivated by the dictates of the difference principle would not require those additional incentives. They are bargaining with the marketable talents afforded by genetic contingency and fortunate circumstance in a way that interferes with the motivation to comply with

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<sup>7</sup> Rawls, *Theory of Justice*, p 294.

justice. Where that motivation is properly held such incentives would not be required and a great deal more material equality between people would be the consequence.

Cohen's argument draws its force from a particular form of 'justificatory community' which he claims would exist between members of a just society:

"A justificatory community is a set of people among whom there prevails a norm (which need not always be satisfied) of comprehensive justification. If what certain people are disposed to do when a policy is in force is part of the justification of that policy, it is considered appropriate to ask them to justify the relevant behavior, and it detracts from justificatory community when they cannot do so".<sup>8</sup>

When individuals whose talents have the ability to command a high market price demand additional money to use those talents productively – and thus for the betterment of the worst off – they act, according to Cohen, in ways that cannot be justified to the other party and thereby break the community of which that justification forms a part. Policies that allow for the use of incentives do so, according to Cohen, *against* the commands of justice as specified by the difference principle: It is only when high-talent individuals act unjustly that incentives such as these are required.<sup>9</sup> Where they are instead motivated by what Cohen calls the 'egalitarian ethos', they act according to one of the demands of justice (as specified by the difference principle) without requiring additional pecuniary incentives to do so: The bettering of the position of the worst off provides reason enough.

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<sup>8</sup> Cohen, *Rescuing justice and equality*, p 43 – 44.

<sup>9</sup> Note that this kind of incentives does not include appeal to the 'special burden' case where work is particularly stressful or arduous. Cohen himself suggests that his opposition 'retires' in the face of such cases. *Ibid*, pp. 55 – 56. I would suggest this 'special burden' actually deals with Titelbaum's example of the individual who receives additional money to pay the commuting costs from her preferred place of living to a working environment where she will most benefit the worst-off. This need not be classed as incentive but rather as a special cost being covered. See Michael Titelbaum, 'What would a Rawlsian ethos of Justice look like?', p 318.

While neither Cohen nor Rawls neglect to account for the individual behaviours that are necessary for the institution of justice, it is Cohen's use of 'justificatory community' that renders those behaviours a less marginal part of his overall understanding of justice. Again, I remain agnostic as to the primacy of the institutions in formulations of ideal justice: The justificatory community and the decisions to which it will be applied are only an aspect of justice, not its totality nor even necessarily its greater part.

### *Expanding the meaning of Community*

There are a number of grounds for accepting the demands of justificatory community. For example, there is the kind of solidarity at work in Cohen's communal camping trip considered below: We justify our actions to others because we see our fates as in some way combined, the role of brother's keeper extended beyond the boundaries established by familial ties. There is also a thinner, contractualist understanding of community that can be derived from a particular understanding of reasonableness. As T.M. Scanlon states it; 'when we address our minds to a question of right and wrong, what we are trying to decide is, first and foremost, whether certain principles are ones that no one, *if suitably motivated*, could reasonably reject'.<sup>10</sup> It is a concern to be reasonable in our interactions with others that motivate this desire to justify ourselves to them.

When Rawls stipulates the need for individuals to 'act from' the principles of justice in the normal course of events, he need not draw on anything as thick as the affective ties of solidarity or feelings of combined fates. Rather, he could similarly be described as specifying the kinds of behaviours appropriate to individuals who are 'suitably motivated' to act in

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<sup>10</sup> T.M. Scanlon, *What we owe to each other* (Oxford: Oxford University Press, 1998) p 189 (italics added). My thanks to an anonymous reviewer at *Social Theory and Practice* for pushing me to clarify the basis of the justificatory community.

ways that they could justify to others in light of the profound contingency and good fortune they may have accrued in the genetic and social lotteries.

This notion of 'justificatory community' thus provides a possible means of developing the Rawlsian 'sense of justice' to include reference to a set of demands that go beyond our conduct at the ballot box. Cohen's arguments are thus important for raising an area of ambiguity within Rawls' theory, specifically regarding what it means for people to 'act from' principles of justice as a part of their 'normally effective sense of justice'.

However, there are resources within Cohen's notion of 'justificatory community' – employed as a means to *challenge* Rawls – which, ironically, offer profound qualifications to the force of his egalitarian ethos. Both the wider understanding of community and the more narrowly defined justificatory community he employs, resist the notion that maximal productivity – as directed by the difference principle – should be that which has such an overbearing hold over how we relate to one another.

There are different reasons and motivations informing our relations to one another that would operate within a just society besides those which can be captured by the egalitarian ethos. To have it otherwise would mean, perversely, flattening complex understandings of community in the *name* of justice: For justice to prevail, so Cohen's position would seem to have it, our obligations and relations to one another should be derived primarily from how much we can benefit the worst off with our productive endeavours: Where we *can* work hard to produce for the position of the worst off, this is what we *must* do – nothing less than justice demands it.

Elsewhere however, Cohen's discussion of the values represented by a camping trip suggests that he himself would *not* embrace such a flattening out.<sup>11</sup> Indeed, it is because the trip works well as an example of community that it is useful as a means of expanding Cohen's particular account of a '*justificatory* community'. It is via this expansion that we gain a better sense of the ethos appropriate to ideal circumstances. Moreover, it is via contrast with this fuller, *ideal* account of community that we gain insight into the different kinds of ethos appropriate to circumstances when such community is lacking, which in turn provides us with the means of better understanding those demands of assistance that are also part of people's 'effective sense of justice'.

Cohen uses the camping expedition to exemplify an ideal form of community. People come together, pool their property with that of others and share an understanding about who is to use what equipment, when and why – all with the aim of ensuring each member has as "good a time" as possible. The good time the individual campers hope to have is thus predicated on their being able to provide the means – through their skills, property and effort – for *others* in the community to have a similarly good time. Indeed, Rawls' interpretation of the difference principle as one of fraternity is intended to produce a similar situation – that is, it is only when one is able to gain as a consequence of others similarly gaining, that one wishes to gain at all.<sup>12</sup>

Now, imagine Harry – the expedition's exceptional fisher – is especially close to one of the other members of the group, Jill, who falls ill. Harry, while perfectly competent as a carer, is not the most qualified member of the group in fulfilling the relevant functions of that position. In addition, while Harry is caring he is not able to catch the group's fish for

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<sup>11</sup> G.A. Cohen, *Why not Socialism?*, (Oxford: Princeton University Press, 2009) pp. 3 – 45.

<sup>12</sup> Rawls, *A Theory of Justice*, p 90.

them.<sup>13</sup> According to Cohen's egalitarian ethos – which demands that where individuals are suitably motivated by concern for others they should choose the job that is most productive from the point of view of those others – Harry should continue to fish. It is via the fish he catches that Harry is able to properly embody the egalitarian ethos and answer to the demands of justice.

If the egalitarian ethos was all community amounted to then Harry should thus get back to the fishing pond and let more qualified members of the group attend to Jill. However, this demand should strike us as reducing too heavily the plurality of meanings represented by community: Community has far more dimensions than this single ethos can hope to capture. Our relations to one another cannot be boiled down to this merely productive function. Moreover, when I discuss non-ideal circumstances below, an over-emphasis on the productive dimension of community generates effects that are wholly *detrimental* to the *pursuit* of (more) justice.

There are two reasons to think that Harry is entitled to attend to Jill even where the fish stock might be reduced somewhat or Jill might not receive the most professional of care. First, care itself is a complex good. Jill might be deeply offended by Harry's following the egalitarian ethos and heading off to fish instead of caring for her. To define care strictly according to professional competence is to miss the deeply human connections that are constituted and sustained by having it performed by people with whom one already has affective involvement. While others in the group might be able to suppress a fever or heal a wound as if by magic, Harry's less effective remedies might still be appreciated in light of

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<sup>13</sup> Emily McTernan, 'The Inegalitarian Ethos: Incentives, Respect and self-respect', *Politics, Philosophy and Economics*, 12:93 (2013) pp. 98 – 99. McTernan similarly takes up the cause of carers within a situation dominated by the egalitarian ethos.

their shared affective bonds.<sup>14</sup> Efficiency can remain an important aspect of care but it is important to appreciate the importance of the *source* of its provision and the complexity this introduces when measuring its 'efficacy'.

Secondly, as Cohen himself recognised, efficiency is a matter of considering *all* the values we have reason to preserve.<sup>15</sup> If there are others who can catch sufficient fish, even though they might not be of the same quality or quantity as previously caught by Harry, then the community might make the collective decision that the value of the care Harry provides to Jill is an all things considered better state of affairs than would hold under a situation where Harry takes care of the fishing but the care Jill receives lacks the deep personal involvement Harry could provide. This might seem like a 'thought too far': Must Harry really first consult the community before he is able to engage in the care he wishes to provide Jill? Does this not also put the quality of that care in question?

While Harry is allowed to follow his personal prerogative to tend to Jill, there nevertheless *should* remain a tension between the identification he has with the community: That is, if it is to be more than simply rhetoric this identification will *inevitably* conflict with other of his identifications. The additional thought is therefore appropriate – if the wider community is a concern for Harry, there should remain a tension between the different sites of his obligations. We have only so much time and energy to give and particular identifications may demand so much of us that others, regrettably, fall by the wayside. By tending to Jill, both their personal prerogatives – to care and be cared for – have come to replace prerogatives that would, in other circumstances, have been directed toward the

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<sup>14</sup> Of course, where the illness is especially severe these concerns might be overridden by more the pressing matter of keeping Jill alive. In such a situation care is not being replaced as such but merely reconstituted as a consequence of the developing circumstances.

<sup>15</sup> Cohen, *Why not Socialism?*, pp. 73 – 74.

wider community. The question remains as to whether they are able to justify this to their fellow-community members, whether they are permitted to identify *more* with their pressing personal prerogative than with those other community demands.

This last response relates to a wider point. Although Harry is less productive in the world where he looks after Jill this does not mean that he will necessarily suffer from atrophy of the kinds of motivation that are appropriate to justice.<sup>16</sup> It is rather that other motivations come into conflict with them, making them difficult to act on. Community is still there as part of Harry's concerns, but there is not the time or energy available for him to act fully in accordance with what that concern would, in other situations, require of him. Difficult decisions thus have to be made about what to do with his finite resources of time and effort.

We can determine whether Harry's siding with his personal prerogative over the other motivations is justified by looking at how Harry could justify that decision to other members of his community.<sup>17</sup> An alternative means of justifying such 'siding' could be to look at the lexical priority of certain goods, as stipulated by Rawls' other principles of justice. So, for example, if Harry had a particularly strong preference for a job other than fishing he could perhaps justify taking this job to other members of the community in light of the priority enjoyed by occupational choice, notwithstanding the demand to produce for the benefit of the worst off.

Turning to Cohen's use of the 'justificatory community', we can ask if Harry is able to justify his concern with taking care of Jill to the rest of the community, even with the drop of

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<sup>16</sup> Cohen also recognises the need to strike a balance in light of this tension. Cohen, *Rescuing Justice and Equality*, p 11.

<sup>17</sup> This is the approach taken, for example, by Titelbaum, 'What would a Rawlsian ethos of Justice look like?'

fish i.e. reduced productivity, that it would precipitate? In any community where bonds between individuals stretch beyond concern with the merely productivist drive that is represented by the egalitarian ethos – and where they recognise the importance of personal, affective ties to the concept of care – I suggest such justification can almost certainly be entertained. Indeed, where it is not we have to wonder what kind of community in fact holds between these people where the only reasons permitted are those pertaining to productive ability.

Indeed, from Cohen's own allusions to personal-prerogatives, it is plausible to suggest that there remain quite considerable reasons Harry can draw on to justify his decision to tend to Jill and reduce his productivity.<sup>18</sup> To imagine otherwise reduces the meaning of community and, moreover, places those worst off in the position of overbearing patients who lack the ability to be appealed to in terms of reasons that pertain to things other than their welfare: To be in community with others is to be egalitarian which in turn is to be productive. Community is thereby reduced to a one way-street of provision and receipt.

What Cohen does not adequately address are the ways in which the mutual justification of personal prerogatives can *itself* be an expression of community. People who work hard for the benefit of the worst off are expressing a concern for their community. In addition, the worst-off in a community who could perhaps benefit considerably from the talented working at maximal productivity, choose instead to permit the use of personal prerogatives similar to those Harry employs, are *also* acting in ways that express community.

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<sup>18</sup> See Cohen, *Rescuing Justice and Equality*, pp. 387 – 394 for a thorough discussion of prerogatives. There is a limit being placed on the kinds of (to borrow Samuel Scheffler's phrase) agent-centred prerogative that will be effective within this justificatory community. For reasons of space, I do not entertain other prerogatives that pertain only to the individual's welfare and not to this issue of care. See also Samuel Scheffler, *The Rejection of Consequentialism* (Oxford: Clarendon Press, 1982) p 14.

They recognise the needs and prerogatives of other members of the community and allow their own welfare to be, marginally, affected. This aspect of community within the act of justification is missing from Cohen's contribution.

Having said all this, Cohen's account of the egalitarian ethos nevertheless recognises an important tension between decisions made in the name of other, important personal goods and decisions made to maximally improve the condition of the worst off. Other costs – such as the 'cost' involved in forsaking a Porsche to allow other members of the community to benefit from what that additional money could provide – might not register with those to whom justification is owed. The exercise of productive-latitude as a means of driving up the pecuniary incentives associated with a particular occupation is not appropriate behaviour for those suitably motivated by the principles of justice. Massively increased opportunities for luxury consumption remain unprotected by the lexical priority afforded certain other goods.<sup>19</sup>

#### *Political Solidarity and Assistance*

In effect, the example of the camping trip develops the idea of mutual justification which, in turn, fills out the kinds of behaviours, motivations and decisions appropriate to citizens who care about and are motivated by justice. Via his explication of the egalitarian ethos, Cohen elaborates *one* of the motivations by which citizens of the just society will be moved: Producing for the benefit of the worst off, as a principle of justice to be acted 'from',

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<sup>19</sup> Exactly what can and cannot be justified and how far the community extends are of course matters of some complexity and contention. For reasons of space I must bracket this issue. My argument assumes that people and groups act in such ways that they cannot and could not justify to others. Michael Titelbaum, by filling-out a fuller Rawlsian sense of justice/ethos with correlates of the principles of justice, provides some means of deciphering reasons that would count as valid for a 'justificatory community'. Titelbaum, 'What would a Rawlsian ethos of justice look like?', pp. 313 – 315.

remains a consideration – amongst competing others – which appropriately motivated citizens should entertain.<sup>20</sup>

With Cohen's criticisms in mind then, it would remain, for example, totally inappropriate for Harry to use his concern for Jill to bargain with others to induce ('naked')<sup>21</sup> inequality-producing incentives that get him to fish for reasons that do not pertain to her care but are rather intended for the expanded consumption possibilities which these incentives would provide.<sup>22</sup> However, what remains absent from Cohen's expansion is a detailed specification different ways in which productive latitude can be justified to a community.<sup>23</sup> By filling out the meaning of 'justificatory community' we have gained a fuller sense of the ethos appropriate to justice which includes more than producing to the best of one's ability.

However, if a just basic structure and an ethos appropriate to the sustaining of that structure, as well as the principles that ground it, are things we one day hope to achieve, it will be as a consequence of the motives, decisions and activities of people in *non-ideal* circumstances. The question remains, however, about how to achieve and motivate that movement from non-ideal to (more) ideal circumstances. Interestingly, the ways in which an ideal ethos changes to accommodate the different demands of non-ideal circumstances offers a potential route toward (more) justice. It is by considering what happens in response of those people – or groups of people – lacking 'suitable motivation' to justify their actions

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<sup>20</sup> This is similar to David Estlund's proposal of 'the moderate version of the difference principle'. Estlund cited in Cohen, *Rescuing Justice and Equality*, pp. 393 – 394.

<sup>21</sup> *Ibid.* pp. 47 – 48.

<sup>22</sup> Again, this is something which Rawls himself (and liberalism more generally) could recognise. See Estlund, *Liberalism, Equality, and Fraternity in Cohen's critique of Rawls*, p 101.

<sup>23</sup> For a full account of this at the *ideal* level Titelbaum, 'What would a Rawlsian ethos of Justice look like?', pp. 289 – 322.

to others, that we gain a sense of what actions are necessary from the point of view of justice.<sup>24</sup>

This lack of 'suitable motivation' produces part of the non-ideal conditions I consider for the remainder of this paper. There might be one group of people who, suitably motivated to justify their actions, nevertheless fail to collectively produce a situation of justice because of another group of people lacking that motivation. Now, the denial of justificatory community per se may not necessarily produce a situation of especially substantial injustice. Whatever we think about those people who refuse to work, so long as they are a small enough group of people, their (potential) lack of ability to justify this decision to others might be a cost society can reasonably afford. In any event, it does not necessarily mean those who *are* suitably motivated need change their behaviours.<sup>25</sup>

However, when the group of people lacking that 'suitable motivation' also combines to affect certain large scale organisational and structural consequences, this changes the kinds of demands that are made of people who remain moved by principles of justice. When confronted with an *absence* of 'suitable motivation', when, in other words, people *do not* conform to this notion of reasonableness, there is something additional being denied: solidarity.

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<sup>24</sup> The extent and scope of this community is something I cannot consider in any detail here. However, it could feasibly extend to include those individuals whose exploitation at the other side of the world provides the material and products enjoyed by the citizens of wealthier countries. Since mutual justification seems to apply within the context of ongoing cooperation, it is hard to deny that justification is owed across the bounded community of a nation state. And it is even harder to see how that justification can currently be given. Application of the concept of justificatory community could thus have potentially radical consequences for the communities within which the appropriate ethoses/ethea will emerge. My thanks to a reviewer at *Social Theory and Practice* for pushing me to address this issue.

<sup>25</sup> The risk of so-called 'drone' can be a cost it is in fact worth society assuming. Carole Pateman, 'Democratising Citizenship: Some Advantages of a Basic Income', *Politics and Society*, 32: 1 (2004), p 103.

Whatever the grounds of 'justificatory community' with others might be, the *denial* of such community is always more than the denial of reasonableness. It is also a denial that these others are owed *solidarity*, that the concerns of the denied group warrant any significant consideration in the decisions and actions performed by the deniers. This point is crucial to the development of the notion of 'assistance' I develop below.

It is this fact, that a denial of justificatory community is simultaneously a denial of solidarity, which provides an important reference point for those wishing to combat such denials. Those who remain motivated by concerns of justice in non-ideal conditions do not get unreasonable. Rather what develops in place of the expansive justificatory community is a more limited, oppositional variety of solidarity. If certain individuals act out of community with owed others, then those others will take action necessary to resist the kinds of unjust consequences those others would seek to institute as permanent features of the world.

Being 'out of community' with others is to fail to be appropriately motivated by the principles and demands of justice. It is a failure to feel that tension between, on the one hand, the decisions made and their reasons for action, and, on the other, the fate of others in the community. This is a situation that fails to meet the conditions that would make an ideal ethos appropriate: We are thus in the realm of non-ideal theory. In such a situation, we cannot assume that simply because a just basic structure coupled with a just ethos describes justice in *ideal* circumstances that we can merely transpose that same ethos onto a situation that fails even to approximate ideal circumstances. Where Harry and others like him *do* act like – to use Cohen's term – 'schmucks', what responses are available to the rest of the community who suffer the costs of that indifference?

In what follows, I describe an alternative ethos, one appropriate to situations characterised by possibly profound injustice. I consider the ways in which solidarity becomes a necessary and important political virtue under non-ideal conditions. The appeal to reasonableness as the grounds of ideal justificatory community is precisely to avoid drawing on 'ties of sentiment and feeling which it is unrealistic to expect between members of the wider society'.<sup>26</sup> Solidarity or fraternity – which I use interchangeably – are too demanding as concepts, prescribing too much in the way of how to regard others and organise one's emotional and practical life, to capture the kinds of demands that can be legitimately made of people in the name of justice.

As a consequence of the desire to avoid this substantive concept, fraternity takes an especially productivist bent within ideal circumstances. So, for example, Rawls regards the difference principle, which is concerned with citizens' productive decisions – what work they decide to do, how hard they decide to work – as a principle of fraternity.<sup>27</sup> Even under the revised and expanded vision of an ethos appropriate to ideal circumstances, expressions of solidarity/fraternity with the wider-community are still made via decisions of how much to produce. The revisions merely supply the means to extend the reasons for which people can exercise productive latitude. This makes sense: Under just institutions the most effective way to contribute to the public good is by providing products or services people value. To ask that people develop additional ties of sentiment to members of the wider-community is to make overbearing, perfectionist demands that interfere with people's emotional and affective lives: We are being told to *feel* a certain way about people and adopt certain relationships

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<sup>26</sup> Rawls, *A Theory of Justice*, p 90.

<sup>27</sup> *Ibid* pp. 90 – 91; Rawls, *Justice as Fairness*, p 49.

with them which we might have other reasons not to endorse. The notion of community cannot legitimately stretch this far.

However, within non-ideal circumstances – such as those we live with today – solidarity, as the development of a specific kind of relationship between people, gains particular *instrumental* importance, notwithstanding the ‘thickness’ or perfectionist impulse implied by that concept. When we consider the actions of individuals who deny the legitimacy of having to justify their actions to a community – or else simply fail to do so – where neither reasonableness nor solidarity figure prominently in their motivations, this latter concept will have to take a different form for those who *are* concerned with justice.

For example, when one group of people start to move their money abroad to avoid paying tax (legally or otherwise), governments will be tempted to lower the tax rates to keep this group’s money within the reach of the state, reducing social spending as a consequence. Others who retain the ‘suitable motivation’ to justify their actions might still be willing, counterfactually, to be taxed to a far greater extent than is presently the case. However, whatever action they now take – voluntarily giving money to the treasury for example – is, however commendable, unlikely to produce a situation approximate to justice. The effects of ‘acting from ‘their particular motivations are swamped by the effects produced by others’ motivations. It is the structures themselves which must change. Unfortunately, working hard and being willing, even though un-coerced, to distribute one’s earnings cannot achieve that.

When confronted with the behaviour of citizens who are unconcerned with the justifiability of their decisions and actions, the costs and nature of assistance shift radically. Exactly what form those costs will take is a difficult and complex task without ready-made

answers. However, a particularly important part of any such assistance is the development of solidarity with other members of a community who are suitably motivated to assume those costs and thereby resist the consequences affected by that other set of individuals.

While the form and details are hard to spell out in the abstract, it is nevertheless possible to describe some of the main tenets that this different kind of solidarity will take. What Sally Scholz has distinguished as ‘political solidarity’ can be described as exclusionary, oppositional and intentional.<sup>28</sup> An exhaustive typology of the different forms of solidarity is not important for the current purposes of this paper. Nevertheless, contrasting the political variant with another species of solidarity will help illustrate both the important instrumental function of this particular variant and the differences between it and the demands of the ideal ethos.

What David Kahane has called ‘civic solidarity’ might refer to the relationships between citizens in a political state.<sup>29</sup> The welfare state is intended as a particular expression of this form of solidarity: It organises and entrenches in laws the obligations citizens have to one another by ensuring that their basic needs are secured. This notion of solidarity is both expansive in that it includes all people within a particular state or political community, but is also exclusive – in its current form, at least – in that there are people who are not members of such communities and who therefore lack entitlement.<sup>30</sup>

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<sup>28</sup> Sally Scholz, *Political Solidarity* (University Park: Pennsylvania State University Press, 2008).

<sup>29</sup> David Kahane, ‘Diversity, Solidarity and Civic Friendship’, *The Journal of Political Philosophy*, 7:3 (1999) pp. 267 – 286. See also Daniel Markovits, ‘Luck egalitarianism and political solidarity’, *Theoretical Inquiries in Law*, 9 (2009) pp.271 – 308 although what Markovits classifies political solidarity is better described in the terms of civic solidarity. For large typologies see Kurt Bayertz, ‘Four Uses of Solidarity’, in Bayertz, *Solidarity*, pp. 3 – 28; Jakob Kapeller and Fabio Wolkenstein, ‘The grounds of solidarity: From liberty to loyalty’, *European Journal of Social Theory*, 16 (2013) pp. 476 – 491.

<sup>30</sup> By focusing exclusively on a species of affective, communitarian solidarity – distinguishing this only from what he calls ‘project-related’ solidarity – Klaus Peter Rippe describes solidarity and institutions like the welfare state as somehow at odds with one another. Since solidarity has had a large role both historically and

Political solidarity is different. First, it is exclusionary in a different way because it is not necessarily confined to the boundaries of a state or geographic location: Such solidarity can exist between particular ethnicities, genders or classes at the other side of the planet. For example, solidarity between workers can occur across national boundaries as they fight against what they consider to be experiences similarly shared and injustices suffered. The same can be said for the Pan-Africanist movement of the 1960's which expanded to cross borders and include peoples affected by colonialism beyond the African continent. Secondly, and as part of this different mode of exclusion, political solidarity does not allow for the kind of passive inclusion that is a part of the above civic solidarity. Where the welfare state might embrace all citizens or residents of a particular state, regardless of what they make of that institution, political solidarity requires more intention on the part of the person. This variant of solidarity highlights 'individual conscience, commitment, group responsibility and collective action': One cannot accidentally be included within the jurisdiction of this form of solidarity.<sup>31</sup>

### *Costs of Assistance*

Without solidarity between people experiencing/perceiving injustice, it is unlikely for a situation to become more just. Part of this justice is precisely the building and preserving of those other kinds of solidarity we have reason to value – such as the civil variant exemplified by the welfare state. *Political* solidarity might ultimately be inappropriate/unnecessary in *ideal* circumstances because, quite conceivably, the situations which give rise to it – namely, injustice and oppression – have been done away with. But the Rawlsian caveat that citizens

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within the current struggle to rescue and restore the welfare state his distinction between justice and solidarity is a peculiar one. Klaus Peter Rippe, 'Diminishing Solidarity', *Ethical Theory and Moral Practice*, 1 (1998) pp. 355 – 374.

<sup>31</sup> Sally Scholz, *Political Solidarity*, pp. 33 – 34. Rippe terms this variety of solidarity 'project related' solidarity. Rippe, 'Diminishing Solidarity', pp. 357 – 358.

are somehow excused from *assisting* in the establishment of just institutions should the costs be too high is made untenable in light of the gap between the actual world and an even remotely just one, and the tremendous effort it will take to bridge that gap.

Where people's preferences do not line up with the demands of political solidarity – where we can therefore uncomplicatedly say people involving themselves in such struggles would prove 'costly' – this does not then mean that to ignore such costs is to be *uninvolved* in producing and sustaining situations of injustice. These are the costs of assistance Rawls alludes to when he describes his 'normally effective sense of justice': Where injustice exists, the activity appropriate to ideal circumstances which requires only compliance, is rendered inadequate – what is the point of sustaining injustice? – and 'assistance' must come to supplement compliant behaviours or, in instances of extreme injustice, altogether replace them.

The 'assistance' generated by political solidarity require the development of certain practical skills and capacities if that solidarity is to prove effective. Tommie Shelby's description of solidarity is useful as a way of highlighting its practical aspects.<sup>32</sup> Shelby highlights five dimensions that are crucial for developing solidarity: identification with the group; special concern ('a disposition to assist and comfort those with whom one identifies'); shared values or goals, and loyalty and mutual trust. With the possible exception of the first, these aspects of solidarity are more than merely passive expressions. Rather, depending on how deeply people engage with organisations that result from solidarity, they necessarily

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<sup>32</sup> Tommie Shelby, *We Who Are Dark* (Cambridge, Mass.: Harvard Belknap University Press, 2007) pp. 67 – 71. See also Michael Walzer, 'The Obligations of Oppressed Minorities', *Obligations* (Cambridge, Mass.: Harvard University Press, 1970) esp. pp. 53-54.

involve a certain perfectionist constraint, supplying norms that will define who a person *is*, what she does and even how she feels.

When someone is in need, for example, the expression of special concern implies we are in a position for that person to approach us and ask for assistance. This involves publicity of some kind, letting fellow-members know we have such concern and proving we are capable enough to assist. Shared goals and values, where they are not readily apparent, require articulation in order to be properly identified with. This is itself a complex process fraught with difficulty and potentially fierce disagreement. After articulation, values and goals also require translating into effective demands and action that can be brought to bear against those in power through a variety of means – this is also subject to disagreement and contestation. Beyond the tasks of articulation, it is also a job for effective leaders of such movements – in communication with its other members – to ‘first champion this turbulent insurgency and then channel it into a set of well-consolidated laws, institutions, and bargaining arrangements that can last a generation or more’.<sup>33</sup>

The development of these skills is crucial for the creation of the *oppositional* dimension that is an aspect of this form of solidarity. Individuals or groups who are unconcerned with ideas of ‘justificatory community’ are called to account, and their desire that business should go on as usual is resisted. This solidarity is thus guided by an adversarial disposition, a notion of ‘us’ *against* ‘them’ in which disruption, withdrawal and more general interference with contemporary productive, political and social practices is both legitimate and necessary.

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<sup>33</sup> Nelson Liechtenstein, ‘Two Roads Forward for Labor: The AFL-CIO’s New Agenda’, *Dissent* (Jan, 2014).

This solidarity can take the form of law-breaking, striking, direct action and, in extreme cases, sabotage and violent insurrection. Such action remains limited by the Rawlsian stipulation that it should assist the development of just institutions.<sup>34</sup> Violence *per se* – even that which is perhaps understandable from the perspective of reactive or vengeful anger – that is not instrumentally guided by this limit is unjustified.<sup>35</sup> Indeed, in response to Malcolm X's pronouncement that 'non-violence is fine so long as it works', we can add that the recourse to violence also assumes that it 'work' for the establishment of justice for it to be legitimate.<sup>36</sup> Where violent might be wholly illegitimate when viewed from ideal conditions, this oppositional activity becomes desirable and perhaps necessary when conditions are unbearable.<sup>37</sup>

Timothy B. Tyson's account of the reaction initiated by certain members of the African-American community to a blatant miscarriage of justice in North Carolina is interesting on this score. The failure of an all-white jury to convict a man for the murder of Henry Marrow galvanised the local African American community, leading to coercively enforced boycotts – in which citizens who broke the boycott had their property broken or

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<sup>34</sup> Or, indeed, to include Cohen's emphasis, create the kinds of conditions where people will develop the kinds of ethos where the principles underlying those just institutions will be supported.

<sup>35</sup> Peter Charles Hoffer, "*Cry Liberty: The Great Stono River Slave Rebellion of 1739* (USA: Oxford University Press, 2010) provides a tragic account of just this kind of vengeful violence that, though understandable, is not a violence motivated by justice.

<sup>36</sup> Indeed, the ideal ethos might act as something of a constraint on the kinds of actions that are permitted at the non-ideal level: Where respect and/or solidarity is denied, other (perhaps violent) actions might be unjustified in light of a hope that *future* involvement with these people is desirable. For this line of argument see Andrew Sabl, 'Looking forward to Justice: Rawlsian civil disobedience and its Non-Rawlsian lessons', *Journal of Political Philosophy*, 9:3 (2001) esp. p 322. For an account of civil disobedience that emphasises the more instrumental reasons of non-violence see David Lyons, 'Moral Judgment, Historical Reality, and Civil Disobedience', *Philosophy & Public Affairs*, 27:1 (1998) pp. 31 – 49. My thanks to an anonymous reviewer at *Social Theory and Practice* for pushing me to clarify this point.

<sup>37</sup> As a consequence, violence might still be rejected but only for more or less instrumental reasons. See Mark Engler, 'The Machiavelli of Nonviolence: Gene Sharp and the Battle Against Corporate Rule', *Dissent* (Fall 2013).

confiscated<sup>38</sup> – alongside the actions of more radical African Americans in the local area who organised strategic and large scale fire-bombings throughout the community, thereby putting significant pressure onto – and fear into – the white section of the population.<sup>39</sup> As Tyson sums up this collective reaction: ‘It had taken the physical threat of “Black Power” to make the moral argument of civil rights mean anything on a local level’.<sup>40</sup> Another way of putting this is that the threat – and use – of violence was organised and guided by the demand that the local ‘justificatory community’ be expanded to include those owed equal membership.<sup>41</sup>

In this example, African-Americans suffering from the yoke of racism certainly *can* justify their actions to the community according to the duty of assistance and the principles which motivate that duty – howsoever this interpretation might be refused or rejected by those people acting out of community with them. The purpose of their action, however, is no longer directed at justification: It is rather to force those individuals and groups – via proportionate and effective means – to stop acting in ways that cannot be justified to the wider community.

Importantly, where people are uninvolved with practices of political solidarity they are not *only* avoiding the costs of assistance. By continuing to produce in unjust circumstances – maximally or otherwise – individuals are also involved in *reproducing* injustice: Producing and consuming goods that are possibly steeped in exploitative practices

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<sup>38</sup> This echoes Walzer’s description of the threat of violence used against people refusing to honour the call for ‘tools down!’ during a strike. Michael Walzer, ‘Civil disobedience and Corporate Authority’, *Obligations*, p 39.

<sup>39</sup> Timothy B. Tyson, *Blood Done Sign my Name* (New York: Random Press, 2004).

<sup>40</sup> *Ibid*, p 252.

<sup>41</sup> The efficacy of such action complicates Sabl’s suggestion that the use of violence and more aggressive political action will make just institutions impossible in the future: This is in fact an empirical claim that does not bear up – as Timothy B. Tyson’s memoir below indicates – under historical reflection. See Peniel E. Joseph, *Dark Days, Bright Nights* (New York: Basic Civitas Books, 2010).

is to facilitate the persistence of those practices: The costs of injustice are always huge for someone.<sup>42</sup> When Rawls fiercely suggests that ‘unjust social arrangements are themselves a kind of extortion, even violence, and consent to them does not bind’, we should be quick to remember that this lack of the ‘power to bind’ is small comfort to those who suffer from the ongoing *existence* of the arrangements.

Were these practices to take place within ideal circumstances, i.e. where they could be justified to everybody implicated in them, they would sustain and reproduce justice. But the assumption that this demand can be simply transferred across the divide is to overlook the shift in affect such productivity generates. This shift also challenges the content – if not the concept – of over-demandingness described by Liam Murphy in his discussion of non-ideal obligations.<sup>43</sup> While he emphasises a choice confronted by a college graduate as one between taking a high-paying job or surfing – a situation in which Murphy believes the student is obliged to opt for the job – productivity cannot have this much hold on our efforts. Yes, the investment bankers might be paying more tax but they are still performing a sustaining function in a situation that needs to change its practices of production and distribution. By withdrawing altogether from production and consumption surfers might even be *less* damaging so far as the demands of justice are concerned.<sup>44</sup> In non-ideal situations of minimal compliance, justice has to refer to more than simply working hard, even where (relatively) high-levels of tax can be accrued from those professions.

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<sup>42</sup> The appropriate ethos might, in light of this, need to create a situation that *transcends* capitalism in order to get out of this situation. See, for instance, Justin P. Holt, ‘The Limits of An Egalitarian Ethos: G.A. Cohen’s Critique of Rawlsian Liberalism’, *Science & Society*, 75:2 (2001) pp. 236 – 261. However, I can remain agnostic on this point.

<sup>43</sup> Murphy, *Moral Demands in non-ideal Theory*, p 27.

<sup>44</sup> Of course, by ignoring maximal productivity and choosing instead to surf the demands of justice are still being ignored: The surfer shouldn’t just surf if he wants to see himself acting justly. Withdrawal must precipitate the activities associated with political solidarity.

I have argued that there is a substantial difference between the kinds of ethos and actions appropriate to an ideal situation and those appropriate to non-ideal situations. The ethos appropriate to situations where the justificatory community is in full effect is going to be qualitatively different to circumstances where the task is to assist with the expansion of that community and the development of a situation designed according to just principles.<sup>45</sup>

There is thus a different basis for the ethos here under examination: It is not expected that everyone in non-ideal situations will embrace the kinds of activity, motivations and demands here being described. The extent of my argument is that so long as we care about gaining more justice, the people who *do* entertain such an ethos are necessary from the perspective of justice, even though ultimately, they might be aiming at situations where such an ethos will be inappropriate.

### *Conclusion*

I began the essay by expanding on the Rawlsian notion of a sense of justice. I did this first by agreeing, broadly, with Cohen's expanding of the scope of justice to include a more demanding account of what is expected of individuals in order to support principles of justice. I then gave shape to the various qualifications to that ethos, qualifications both Cohen and Rawls could conceivably entertain, by developing Cohen's notion of 'justificatory community'. Consequently, what emerges from the interaction of these two thinkers provides a larger overall picture of the kinds of ethos appropriate to ideal conditions.

However, while this fuller ethos and the community which gives rise to it might be suitable for ideal conditions, this ethos will differ significantly within non-ideal

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<sup>45</sup> Murphy, *Moral Demands in non-ideal Theory*. While I agree with the thrust of Murphy's argument is focus on the demandingness of productivity is too limiting. However, he does recognise other demands – similar to the ones I raise above. See *Ibid.* p 13.

circumstances, which I characterise as the failure of that motivation to hold for all those owed membership to the 'justificatory community'. Where injustice is substantial a different ethos is required.

The second part of this essay explored the effects of that shift between levels. Specifically, I focused on the ways in which solidarity – as 'political solidarity' – becomes more oppositional, disruptive and confrontational. This ethos underlines the 'assistance' part of Rawls' 'normally effective sense of justice'. Where we might hope to attain a situation where all we need do is comply with the principles that describe ideal justice, we are a long way from that situation as it stands. Developing an ethos for the demands of the here and now is a far more pressing matter than wondering as to what an ethos looks like against an already just set of institutional practices and with a population of suitably motivated citizens.